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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964 –

No. 507

MABEL DAVIS JAMES, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

Respondent's opposition to the petition herein should not, for the following reasons, be given more than a minute amount of weight on the scales being balanced.

1. It is significant that although the Tax Division of the Department of Justice[1] asked for and obtained a three week extension of time to prepare its brief in

[1] All Government counsel with the exception of the Solicitor General of the United States, Archibald Cox, Esq., are assigned to and are a part of the Tax Division of the Department of Justice, and none are a part of the Solicitor General's Office.

opposition herein, it has filed a cursory one and one-half page argument which makes no pretense whatever of responding to any of the reasons contained in the petition setting forth why the writ should issue. This is true with respect to Points I, II and III[2] of the petition. Instead the Respondent has merely argued that the decision below is correct, and attempted to support that conclusion by posing and then answering a secondary question first—whether an estate's income is taxable to the "recipient" under Section 662 of the Internal Revenue Code of 1954. Then, after assuming the answer to the very question before the Court—whether a widow's allowance is income within the meaning of that term as used in the Sixteenth Amendment—the Tax Division poses its second question which is "whether such a tax is constitutional." That is, the Respondent is telling the Court that the question before it is whether a tax on *income* is constitutional.

But surely it is clear that, along with the inability to answer any of the reasons set forth in the petition why a writ should issue, the mere posing of such a

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[2] Thus, the Respondent made no effort to show that the decision of the court of appeals below does not conflict with this Court's decision in *Tank Truck Rentals* v. *Commissioner*, 356 U.S. 30 in that the former decision has frustrated the public policy of Arizona in granting widow's allowances. Nor did it make any attempt to point out that *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 had not been misconstrued when the court of appeals simply held that all accessions to wealth are income or that the payment of a widow's allowance is an accession to wealth when paid from an estate's income. And finally a total silence also confronts the reasons set forth in Point I of the petition why the issues herein are important, involve large numbers of taxpayers and substantial amounts of revenue, and can be expected to generate a great volume of tax controversy.

"question" constitutes powerful support for the conclusion that Respondent cannot show that a widow's allowance is income within the meaning of the Sixteenth Amendment.

Here the question is the same as that presented to the court of appeals and the district court. It is whether a *widow's allowance,* whether paid from income *or* corpus, is income as that term is used in the Sixteenth Amendment. And that question cannot be answered by posing and answering another question which assumes that the item *is* income—whether an amount paid from an estate's income is income to the recipient under Section 662 of the Internal Revenue Code of 1954. Such an approach is actually nothing more than an attempt to determine the nature of an item in the hands of the recipient (whether income or not) by referring back to its nature in the hands of the estate or other payor. Such a reasoning process is error because there is not, as the court of appeals once conceded itself,[3] any relevant relationship between the nature of an item (whether income or not) in the hands of an estate or other payor and its nature in the hands of a recipient. And any attempt to answer the question of whether a widow's allowance is income under the Sixthteenth Amendment by concluding that it is because it was paid out of the income of an estate constitutes an outright begging of the primary question before the Court. A receipt is not income under the Constitution because it was income to someone else or simply because it is assumed to be income. It is only income under the Constitution if it (the amount received by the taxpayer) fits into the concept of income as determined by this Court. Because that is

[3] See ftnt. 1 at page 3 of the petition herein.

the one issue which the Respondent could not or would not discuss in the court of appeals, the latter had no choice, if it was going to rule for the Respondent, other than to rely on the latter's reasoning and hold that a widow's allowance is income to the widow if it was paid out of the estate's income.

Furthermore, even if it were possible to answer the primary question of whether a widow's allowance is income to a widow under the Constitution if paid from an estate's income by invoking the provisions of Section 662 of the Internal Revenue Code of 1954, the Government still has no case because Section 662 does not impose an income tax on the recipient of a widow's allowance where the payment is made from an estate's income. The conclusion that Section 662 does so is based on the erroneous conclusion that the recipient of a widow's allowance is a "beneficiary" within the meaning of the latter term as used in Section 643 (c). This is so because Section 662, imposing the tax, applies only to amounts paid by an estate to a "beneficiary." Yet Section 643 (c) simply defines a beneficiary as including an "heir, legatee, devisee." And it is this lack of coverage which forces the Respondent to reach out and argue that since the petitioner received payments from the estate by virtue of state law, "she was thus a *statutory* beneficiary[4] of the estate."

Thus, not only does Section 662 not provide an answer to the fundamental question of whether a widow's

[4] Although the Respondent made the same contention (that the widow was a statutory beneficiary) in the court of appeals, the latter did not so hold or state. Rather, the furthest the court of appeals was willing to go was to state that: "We think that the widow's position is *much closer* to that of a 'beneficiary' of the estate than to that, for example, of a creditor" (Pet. 5a).

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allowance paid from an estate's income constitutes income to the widow under the Sixteenth Amendment, it also does not provide an answer to the question posed by the Respondent. Section 662, as limited by Section 643 (c)'s application only to a "beneficiary", does not state that the recipient of a widow's allowance is a beneficiary who must pay income tax thereon.[5]

2. Nor do the five cases cited by the Respondent at pages 4 and 5 of its response (none of which were relied on or cited by the court of appeals) sustain the proposition that the Constitution allows the taxation of a widow's allowance when paid from an estate's income. In the first place none of the five cited cases deal with the question of whether a *widow's allowance,* if paid from the income of an estate, is income under the Constitution.[6] Secondly, none of the five cases even support the principle for which each was cited, i.e., "a receipt of money by a *beneficiary* from the income of an estate has long been recognized as a receipt of income within the meaning of the Sixteenth Amendment."

Irwin v. *Gavit,* 268 U.S. 161, held that a receipt of money by a beneficiary from the income of a *trust* was taxable to the trust beneficiary. The case distinguished between a gift, bequest or devise of property *and* a gift, bequest or devise of a right to income from property.

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[5] Even the regulations under Code Sec. 662 are silent on taxability of the allowance to the widow. Treas. Reg. § 1.662 (1954).

[6] If *Irwin* v. *Gavit,* 268 U.S. 161 (1925) had so decided in 1925, then *Buck* v. *McLaughlin,* 48 F. 2d 135 (1931), decided six years later and holding that a widow's allowance did not constitute taxable income under the Constitution whether paid from income or corpus would have been contra. Yet the Government, which lost the *Buck* v. *McLaughlin* case, *supra,* did not bother to file a petition for a writ of certiorari in the latter case.

The rule of the case was subsequently incorporated into Section 22(b)(3) of the 1939 Internal Revenue Code by an amendment in 1942.[7] Section 22(b)(3) of the 1939 Code is the predecessor to Section 102(b) of the 1954 Internal Revenue Code which latter section has not been relied on herein either by the Court of appeals or the Respondent.[8] Therefore, how *Irwin* v. *Gavit, supra,* could have any application here, the petitioner fails to see.

Helvering v. *Butterworth,* 290 U.S. 365, held that a *trust* was entitled to a deduction (under Section 219 of the Revenue Act of 1924 so providing) for the amount of its income which was currently to its beneficiary and that "a widow who accepts the provisions of a husband's will and receives part or all of the income from an established trust in lieu of her statutory rights [is] a beneficiary within the ambit of the statute."[9]

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[7] "Under the existing law, the value of property acquired by gift, bequest, devise, or inheritance, but not the income therefrom, is excluded from gross income by the provisions of section 22 (b) (3) of the Code. This section has been construed as not requiring the exclusion from gross income of amounts received under a gift, bequest, or devise of a right to income from property. *Irwin* v. *Gavit* (268 U.S. 161 (1925)). This construction of the existing law is now written into the bill for the sake of clearness." H.R. Rep. No. 2333, 77th Cong., 2d Sess. 66-67; Sen. Rep. No. 1631, 77th Cong., 2d Sess. 70.

[8] Petitioner, of course, did not have any "right to income" within the meaning of the *Irwin* v. *Gavit, supra,* rule, but merely a statutory right to a widow's allowance. For example, she could not have demanded that the Superior Court of Arizona order the widow's allowance be paid out of the income of the estate. Indeed there is a serious question whether the Superior Court has the power to so order a widow's allowance to be paid from an estate's income. See *Title Ins. & Trust Co.* v. *Comm.,* 25 B.T.A. 805.

[9] 290 U.S. 369.

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In *Smith* v. *Westover,* 191 F. 2d 645 (C.A. 9) it was held that the taxpayer, a beneficiary of a *trust,* had received a distribution of trust income and not a distribution of a trust corpus since the trust had current net income in excess of the amount that was distributed to her. Such trust income was taxable to the trust beneficiary under the applicable statute.

And in *Carlisle* v. *Commissioner,* 165 F. 2d 645 (C.A. 6) the taxpayer was the residuary *legatee* of an estate. Prior to its final distribution the estate sold some securities and realized a capital gain thereon. The taxpayer claimed that what she received was a distribution of the residuary corpus of the estate, including that portion which represented the capital gain realized from the said sale. It was held that the taxpayer-legatee had received a distribution of estate income which had become payable during the taxable year and that the statute provided that it was taxable income to her.

In short, not one of the foregoing four cases supports the respondent's statement that" a receipt of money by a *beneficiary* from the income of an *estate* has long been recognized as a receipt of 'income' within the meaning of the Sixteenth Amendment." None of the cases even discussed the issue of whether the disputed payment was income under the Constitution. Therefore, how can the Respondent cite such cases as holding that there was no Constitutional barrier to their taxation as income? And when it is further noted that three of the cases involved payments from a *trust,* how can the Respondent cite the cases as involving beneficiaries of an estate? And how does the fourth case support the statement when it involved a legatee rather than a beneficiary?

The fifth case cited by Respondent as its Constitutional support was *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431, which was preceded by a *cf.* However, the said case cannot be said to be sufficiently analogous to support the statement that it has *long been recognized* that a receipt of money by a beneficiary from the income of an estate is income *"within the meaning of the Sixteenth Amendment"* because this Court expressly rejected a Constitutional interpretation.[10] Indeed it is fair to ask, in view of this Court's express renunciation of a constitutional decision, why Respondent cited the case as constituting constitutional support?

CONCLUSION

Since there is no specific basis for the Tax Division's opposition to the writ, the question remains as to whether its mere opposition is entitled to any weight. That is, should the mere fact that the Respondent opposes certiorari in a tax case be given weight by this Court on the assumption that the former makes a conscious broad collective policy judgment based on an overall view of tax law and is not myopically preoccupied with winning the disputed case, and that, therefore, its recommendations are more objective? As will be shown below, the answer is no.

In *Ryan* v. *United States,* October Term, 1964, No. 12, the Tax Division filed a brief in opposition to a petition for a writ on December 26, 1963. It told this Court therein, at page 7, that "there is no need for uniformity among the circuits on the relatively unimportant ques-

[10] The Court said at 348 U.S. 429: "It is conceded by the respondents that there is no constitutional barrier to the imposition of tax on punitive damages. Our question is one of statutory construction: are these payments comprehended by § 22(a)."

tion involved. The petition for a writ of certiorari should be denied." However, "subsequent to the filing of the said brief in opposition in this Court, the Government was apprised of the decision by the Court of Appeals for the Third Circuit in *United States et al.* v. *Max Powell and William Penn, Inc.,*" in which it lost the same tax issue. Consequently, on January 15, 1964, in a Supplemental Memorandum filed in *Ryan, supra,* the Tax Division hastily withdrew its opposition to the petition which it had three weeks earlier labeled as raising a relatively unimportant issue. Later, and not surprisingly so, the Government then filed a petition itself in the *Powell and Penn* case, *supra,* which it had lost. (October Term, 1964, No 54). Thus, while the Tax Division acted as any good advocate, it is perfectly clear that the Respondent's opposition to a petition for a writ of certiorari is entitled to no more weight than that accorded to any other advocate whose primary concern is the outcome of the single case involved. This is particularly true in the instant case where the Respondent has failed to respond to the reasons assigned in the petition.

Respectfully submitted,

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